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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,

Petitioner,

v.

WILLIAM HOLLOWBREAST, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT CLASS OF NORTHERN CHEYENNE INDIANS

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals No. 73-1545 is reported at 505 F.2d 268 (1974); and the opinion of the District Court for the District of Montana is reported at 349 F. Supp. 1302 (1972).

ISSUES

1. Whether or not the respondent class and their predecessors in interest received a vested property right in the minerals in and under their respective allotments, which is protected by the Fifth Amendment of the United States Constitution, by virtue of the act of June 3, 1926 (44 STAT. 690) as amended;

2. Whether or not the respondent class is entitled to the revenues received by the petitioner by virtue of the execution of leases and prospecting permits covering the minerals in and under their respective allotments;

3. Whether or not the petitioner is liable to the respondent class for damages done to the surface of their respective allotments by the permittees and lessees of the petitioner in exploring for mineral deposits, in and under said allotments; and,

4. Whether or not the respondents are entitled to an injunction to enjoin the petitioner and its permittees and lessees from going upon their respective allotments for the purpose of exploring for mineral deposits.

PIVOTAL ISSUE

It was held that all of the above issues cited heretofore herein are collateral, ancillary and dependent upon one central pivotal issues:

Did the respondent class of Northern Cheyenne Indian allotees, heirs and devisees receive a vested property right in the *minerals in and under their respective allotments*, which is protected by the Fifth Amendment to the U.S. Constitution, by virtue of the Act of June 3, 1926 (44 STAT. 690), as amended, or

by virtue of the Treaty of 1868 (15 STAT. 655) or both.

These were and are the issues in the case at bar, and the pivotal issue, it is pristine clear, is a pure question of law.[1]

RESPONDENTS' POSITION

It is the respondents' position that they do have a vested property right in the minerals, beneath *their allotments* by virtue of the Act of June 3, 1926, (44 STAT. 690) as amended, protected by the Fifth Amendment to the U.S. Constitution, and or, also, by virtue of the Treaty of 1868 (15 STAT. 655), and further, that the Ninth Circuit Court of Appeals was correct in so mandating.

LITIGATION HISTORY

The Northern Cheyenne Tribe, Inc., at the direction of Congress[2] brought this action in the District Court under a special grant of jurisdiction against respondents, individual owners, and class respresentatives of all allottees, their heirs and devisees, *owning allotments of land* within the exterior boundaries of the tribal reservation on or about July 2, 1970.

At stake are the rights to the mineral deposits contained in and beneath *these allotted lands*. In 1968,

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[1] See District Courts Order below of May 30, 1972, pages 4 and 5.

[2] Act of July 28, 1968, 82 Stat. 424, 425.

Congress attempted to reserve these deposits in perpetuity for the benefit of the tribal corporation, provided the tribal corporation institute this suit:

> "... to determine whether under the provisions of the Act of June 3rd, 1926 (44 STAT. 690), as amended, the allottees, their heirs or devisees have received a vested property right (in the minerals) which is protected by the Fifth Amendment ..."

to the United States Constitution. (Insert supplied; Act of July 28, 1968; cited supra).

The District Court held that no property rights were received and awarded judgment, including all prospecting permit and lease moneys, to the tribal corporation on or about September 29, 1972. Rehearing was denied to the respondents on or about November 28, 1972.

Respondent class timely appealed and the U.S. Court of Appeals for the Ninth Circuit reversed and remanded on October 17, 1974.

Petitioner, which had been represented by the Tribal attorney, Bert W. Kronmiller of Hardin, and Messrs. Longan & Holmstrom, of Billings, Montana, substituted the present opposing counsel who filed an untimely petition for rehearing on February 28, 1975, with the Court's permission. The petition itself was later denied on April 28, 1975.

Extensions of time were granted by Justices of this High Court to petitioner within which to file its petition for writ of certiorari first on December 28, 1974, extending the time to March 1, 1975, and second, on February 19, 1975, extending the time to March 16, 1975.

The petition for writ of certiorari followed to this High Court which was granted October 14, 1975.

Again an extension of time was granted to petitioner, in this instance, to file his brief on the merits, up to and including December 12, 1975.

This brief is offered in opposition to petitioner's brief and prayer for relief therein.

LAW AND ARGUMENT

1. Introduction

With all do respect for the petitioner, after having plodded through its brief, I cannot help but comment that those who have the least to say contrive to spend the most time in saying it.

The arguments advanced appear to cover the entire legal spectrum of forensic eloquence, from Constitutional law to contract, from Congressional intent to Indian lobbying, from Governmental policies to a history of the Northern Cheyenne Tribe, from the plenary powers of Congress to the destitute condition of the Tribal corporation, and finally to the National energy crises.

One finds it, in deed, bewildering when in the presence of this herculean effort, if the dispute involves a single pivotal issue of law!

In all of the petitioner's expounding, theorizing, conjecturing, and further presenting its contentions, the one open obvious and notoriously glaring omission in this treatise as submitted, is the failure to recognize, explain and otherwise treat adequately, the absence of the similarly qualifying phrases in the Northern Cheyenne allotment act that appear in the Crow, Osage and Fort Belknap Acts, *all passed prior to the Northern Cheyenne Act.*

This intentional omission by the U.S. Congress, of the similar qualifying phrases, such as "... *unless otherwise ordered* by Congress...",[3] (Emphasis Supplied) following the grant of the mineral estate which appears in other allotment acts, is the expressed intent of the Congress, to surrender and pass to, and vest in, the allotees an unequivocable and unrevokable fee simple estate in the minerals, subject only to the term of years in the tribe. In addition, the petitioner is noticeably silent as to the provisions of the historical Treaty of May 10, 1868,[4] which originally was intended to convey allotments, including the minerals to the individual indians.

These omissions coupled with the failure or refusal of the petitioner to recognize the difference between tribally owned land and allotted land are certainly determining factors in its failure to carry its burden of proof.

The many new and additional questions and issues now first raised by petitioner at this late date, present an attack on far too wide a front, as a review by this High Court of the rolls and records of this case in the lower Courts, will disclose, they were not raised at that time at those levels, and cannot, and should not, respondents respectfully submit, be considered now.

Therefore, even though much of the petitioner's presentation has no application to the case at bar, the respondents shall once again rebut, and also limit within

[3] Crow Allotment Act, of June 4th, 1920, 41 Stat. 751, as amended, 73 Stat. 565 in 1959; Osage Allotment Act, of June 28th, 1906, 34 Stat. 539; Fort Belknap Allotment Act, of March 3, 1921, 41 Stat. 1355.

[4] Treaty of May 10th, 1868 (15 Stat. 655) will be treated later herein more extensively.

reason, the legitimate arguments pertaining essentially and substantially to the pivotal issue.

2. Treaty, Legislative and Historical Background

The natural band, or tribe of Northern Cheyenne Indians surrendered and laid down their arms against the U.S. Armed Forces and accepted in return, the provisions of "The Treaty with the Northern Cheyenne and Northern Arapaho", signed May 10, 1868 (15 Stat. 655), ratified by Congress July 25, 1868, and proclaimed August 25, 1868, (see appendix A-1 through A-7). There was offer, acceptance, consideration, a meeting of the minds, agreement and there was a legally binding and valid treaty. Although it may be contended by some few, that since hostilities subsequently continued,[5] the treaty was invalidated, it can and is contended by the greater majority, that the Indian Wars that erupted were because of broken White promises.[6] The resultant banishment to Oklahoma, and the trail of tears of the "Morningstar People" to reclaim their Montana lands promised to them in that 1868 Treaty is admittedly, a shameful historical fact.

[5] The Northern Cheyenne, together with the Sioux, defeated Lieutenant Colonel Custer at the Battle of the Little Big Horn on June 25th, 1876.

[6] Lieutenant Colonel Custer massacured the Cheyenne, including women and children, and their allies at the battle of Washita, *November 1868*, and then in 1874 Custer commanded the expedition into the Black Hills which led to renewed hostilities with the Sioux, and finally to the Battle of the Little Big Horn, 1876. (The Columbia Encyclopidea, Vol. 6, Page 1674).

In that 1868 Treaty, land both *tribal* and *allotted* were promised to the Northern Cheyenne Indians, and the land itself was designated as a "*permanent reservation*", and was given to the natural band or tribe in return for their surrender of all other claims to all other lands and territories.[7]

The Northern Cheyenne reservation was then reconfirmed and circumscribed and set out in greater detail by President Chester A. Arthur's Executive Order of November 26, 1884. (Vol. 1 of Indian *Affairs, Laws and Treaties*, of Charles J. Kappler at Page 860).

The reservation was later enlarged by President McKinley's Executive Order of March 19, 1900. (Kappler, cited supra, pages 860 - 861).

None of these aforementioned documents, not the treaty or the two executive orders, reserved any of the minerals beneath the *allotments* or the tribal lands to the tribe, or to the U.S. Government.

The Cheyennes had been, for as long as history records, a proud, fierce aggressive warrior-like tribe and accustomed to a nomadic existance.[8]

They did not think of land as being capable of ownership, but rather they thought of the earth as their Mother from whom they drew sustenance.[9]

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[7] "Art. 3. If any individual belonging to said tribes of Indians . . . *he shall have the privilege to select, . . . a tract of land within the reservation* not exceeding *three hundred twenty acres* . . . but the same may be occupied *and held in the exclusive possession of the person selecting it, and of his family* . . ." (See Treaty of 1868 cited supra., emphasis supplied, 15 Stat. 655; Art. 2 et seq.) (appendix A-1 through A-7).

[8] J. McLaughlin, My Friend, the Indian, 81 (1963 ed.).

[9] Cited supra, et seq.

The Cheyenne suffered intolerable hardships in adjusting to a sedentary type of existance on the reservation.[10]

Nevertheless, beginning with that infamous 1868 Treaty and continuing through to the year 1934 at least, the primary governmental policy toward the Indians, and more specifically to the Cheyennes, was to give to the individual, a tract of land in fee simple, in the hope that he would pursue an agrarian existance as did most whitemen. (See Treaty, cited supra in toto appendix A-1 to A-7).

The pronounced purpose of the U.S. Congress in 1887 when the *General Allotment Act*, (Dawes Act, 24 Stat. 388.) was passed, was in short, to do away entirely with tribal lands and issue a patent in fee to the individual Indians with only a restriction on alienation for twenty five (25) years. (See Dawes Act, cited supra; and also, J.P. Kinney's Study. "*A Continent Lost a Civilization Won*", and also, "*History of the Allotment Policy*", by D.C. Otis.)

In any event, "*A Bill Granting Citizenship to Indians, and for other Purposes*", (43 Stat. 253, 8 U.S.C. 3) of June 2, 1924, removed any and all doubt, if any had theretofore existed, that the Indian was

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[10] Cited supra, et seq.

entitled, just like all other citizens to his constitutional rights and protections.[11]

Under the foregoing authorities, it must be concluded that Indian title to the minerals is valid as against Federal administrative agencies, Acts of Congress, and as well as against private parties or tribal corporations. (See C.F. Memo Sol. I.D. July 1, 1936, also, – holding Government officials are not authorized to mine coal in the Navaho Reservation without consent of the Indians.)

On June 3, 1926, "*An Act to Provide for Allotting in Severalty Lands within the Northern Cheyenne Indian Reservation in Montana, and for other Purposes*", became law. (44 Stat. 690).

It is indisputable therefore, that the reservation of the minerals, including oil and gas, and other natural deposits to the tribe for a mere term of fifty (50) years, in Section 3 thereof, referred to the natural band or tribe of North American Aboriginies, collectively composing the Northern Cheyenne Tribe at the time, *who for the most part are the respondent class in this*

[11]I think nothing makes the intent and motive of Congress more clear, except the 1926 Act itself, than to quote herein Attorney General (afterwards, Justice) Stone's opinion rendered on *May 27, 1924,* just a few days before citizenship was conferred on the Indian, with reference to the proposal of Secretary of the Interior, Fall, to open Executive order reservation of lands to mineral entry, under the laws governing minerals within the public domain. After indicating these general mining laws would have no application on Indian Reservation lands, he declared: "*. . . these treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe, and that meant, of course, that the minerals and all other hidden or latent resources go with the fee*". (Emphasis supplied)

action. It could not have possibly meant the tribal corporation.[12]

Subsequently, on July 24, 1968, Public Law 90-424,[13] an amendment to the 1926 Act became law, the constitutionality of which is here now in question, attempting to reserve in "*Perpetuity*"[14] the minerals to the tribal corporation.

Respondents contend this was an act of naked confiscation.

3. The Significance of the Treaty of 1868[15]

The question of whether or not the allottees, their heirs or devisees of the Act of June 3, 1926, 44 Stat 690, received a vested property right in the minerals beneath their respective allotments must be considered in light of the treaties, statutes and language peculiar to that particular grant. It has been repeatedly correctly stated:

> "Whether a possessory right of an Indian Tribe includes minerals depends, as does every other question relating to the extent of Indian

[12]The natural band or tribe of Northern Cheyenne Indians did elect to become a Federal Tribal Corporation *by a majority of the minority voting* under the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935, (49 Stat. 378) and finally ratified November 7, 1936. (See also, pages 11 and 12 of the respondents' brief in the District Court in support of the respondents' cross-claims and counter-claims, as submitted May 2, 1972), and appendix C-1 thru C-7).

[13]82 Stat 424, 425.

[14]82 Stat 424, 425 (cited supra).

[15]15 Stat 655 (cited Supra).

possessory rights upon *treaty, statute, executive order* or other document or course of action upon which the right is based.[16]

(Emphasis supplied)

The Northern Cheyenne Indians were granted certain rights and privileges by virtue of the Treaty of Fort Laramie with the Sioux, Act of September 17, 1851.[17] However, the specific treaty provisions between the Northern Cheyenne Indians and the United States are set forth in the Treaty of Fort Laramie with the Northern Cheyenne and Northern Arapaho, Act of May 10, 1868, 15 Stat 655. (See appendix A-1 through A-7).

One such provision permitted an individual belonging to the tribe to select a tract of land not larger than three hundred twenty (320) acres for the purpose of farming. The language of that provision is as follows:

"Article 3. If any individual belonging to said Tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservations not exceeding *three hundred and twenty acres* in extent, which tract, when so selected, certified and recorded in the *'Land Book'* as herein directed, shall cease to be held in common, but the *same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it".*

(Emphasis Supplied)

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[16] *Federal Indian Law,* P. 648 (3rd Ed. 1966).

[17] 11 Stat 749.

"Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding *eighty acres* in extent, and thereupon be entitled to the *exclusive possession* of the same as above directed."

(Emphasis Supplied)
(Cited supra)

Reasonable and prudent men everywhere would agree that the term *"exclusive possession"* as used in the treaty could only mean the government intended to pass a fee simple title to the individuals selecting allotments, and to the tribe in the lands held in common.[18] The same interpretation must be made of the words *"permanent Home"* and *"permanent reservation"* and *"will attach themselves permanently"*[19] (Emphasis Supplied).

At this juncture in time, with the Court's indulgence, I would like to quote the Honorable Senior District Judge Jameson himself, (who ruled against respondents at the District Court level), who himself,

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[18] 15 Stat 655, cited supra, Art 2, et seq.

[19] *"Article 2.* The Indians, parties to this Treaty, hereby agree to accept for their *permanent home* some portion of the tract of country set apart and designated as a *permanent reservation* for the Southern Cheyenne and Arapaho Indians by a Treaty entered into by and between them and the United States, at Medicine Lodge Creek, on the day of October, Eighteen Hundred and Sixty Seven .... and the Northern Cheyenne and Arapaho Indians do hereby relinquish, release and surrender to the United States, all right, claims and interest to all territory outside the two reservations above mentioned except the right to roam and hunt .... And they do solemnly agree that they will not build any permanent homes outside of said reservations, and that they *will attach themselves permanently* ...."

(Emphasis Supplied)

(See 15 Stat 655, Art 2, et seq)

on January 7, 1966, in the case of *United States of America v. Peter Bruisehead and Genevieve Bruisehead, his wife, Ethel Leech and A. E. Leech Company, a Montana corporation,* Civil No. 2515, declared:

> *"Obviously in the absence of a restriction or a reservation a fee simple patent covers the minerals as well as the surface rights."*[20]
>
> (Emphasis Supplied)

There were no restrictions or reservations of the minerals to the United States, or to the tribe in the treaty of 1868 (cited supra) or in the executive orders of November 26, 1884, (cited supra), or of March 19, 1900 (cited supra). Failure to reserve the minerals, the United States conveyed them. Courts have repeatedly held that with regard to formal treaties:

> "... all treaties made or which shall be made under the authority of the United States shall be the supreme law, of the land and the judges in every state shall be bound thereby anything in the constitution or laws of any state to the contrary notwithstanding."
>
> (Emphasis Supplied)[21]

Treaties like agreements, can be modified,[22] except that rights created by carrying the agreement into effect

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[20]The Court made this pronouncement in interpreting the Flathead Statute that reserved the minerals to the tribe.

[21]*Pronovost v. U.S., 232 U.S.* 487, 58 L.Ed. 696, 34 S.Ct. 391; *U.S. v. the Schooner Peggy,* (U.S.) 1 Cranch 103, 2 L.Ed. 49; *Louisville & N.R. Co. v. Scott,* 133 Ky. 724, 118 S.W. 990, Affd. 219 U.S. 209, 55 L.Ed. 183, 31 S.Ct. 171; *Butschkowski v. Brecks,* 94 Neb. 532, 143 N.W. 923, U.S. Const. Art. 6.

[22]*United States v. Seminole Nation,* 299 U.S. 417, 428, (1937) and *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564-67.

cannot be impaired.[23] (Emphasis Supplied) Although all attempts by respondents to locate the *"land Book"*[24] referred to in the Treaty have been thwarted, none the less, it has been conclusively established that it was the intent of the Government to pass a fee simple estate in the reservation, including the minerals to the individuals, and to the tribe. The words of the Treaty must be construed as illiterate people would understand them.[25] But of even greater significance is the ratification of this treaty by President Chester A. Arthurs's Order of November 26, 1884, circumscribing in greater detail the reservation. It is respondents' contention that this was a valid ratification by executive proclamation after hostilities had ceased, of the original 1868 treaty and in support thereof, cite *Antoine v. Washington,* 420 U.S. 194, 43 L.Ed. 2d 129, 95 S.Ct. 944, 43 U.S. L.W. 4257, decided February 19, 1975.

Mr. Justice Douglas concurred in that case and wrote the opinion that a grant of rights to Indians, *"on an equal footing with other citizens of the United States, ..."* had been ratified, and that a treaty like a statute, was the supreme law of the land. (Cited supra)

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[23]*Choate v. Trapp,* 224 U.S. 665, 671 (1912), *Gritt v. Fisher,* 224 U.S. 640, 648 (1912), quoted with approval in *Sizemore v. Brady,* 235 U.S 441, 450 (1914), *Cherokee Intermarriage Cases,* 203 U.S. 76, 93. *Stephens v. Cherokee Nation,* 174 U.S. 445, 488; *Cherokee Nation v. Hitchcock,* 187 U.S. 294; *Wallace v. Adams,* 204 U.S. 415, 423 (P. 648) Amended V U.S. Const.

[24]15 Stat 655 in Art 3, (Cited Supra).

[25]"Treaties and legislative acts relative to Indians should be construed as illiterate people would understand them." Adams et al v. Osage Tribe of Indians, 59 F2d 653 (C.A. 10th (1932), cert. denied 287 U.S. 652, 77 L.Ed. 563, 53 S.Ct. 116.

and, also see respondents' brief submitted in this same term of Court Case No. 75-5366, presently still pending. Also, Acts of appropriations by Congress under Treaty of 1868 constitutes other ratifications by the Congress. (See appendix B-1.)

Whenever there has been a *Governmental recognition* of the Indians right to occupy lands, they have a right of occupancy which cannot be taken from them without just compensation. As early as 1821, 1 Op. Atty. Gen. 465, 466 (William Wirt) stated:

> *"The conquerors have never claimed more than the exclusive right to purchase from the Indians . . . "*
>
> (Emphasis Supplied)

Then in 1832, in Worchester v. Georgia, 6 Pet. 515, 543, 544, 547, 8 L.Ed. 483, Justice Marshall declared:

> "It is difficult to comprehend the proposition . . . that the discovery . . . should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors . . . *It gave the exclusive right to purchase,* but did not found that right on a denial of the right of the possessor to sell . . . *The king purchased their lands . . . but never coerced a surrender of them."*
>
> (Emphasis Supplied)

Again in 1941, in *United States v. Santa Fe R. Co.*, 314 U.S. 339, 356, 62 S.Ct. 248, 256, 86 L.Ed. 260, the Court again mandated:

> "In our opinion, taking *original Indian Title without compensation* and without consent does not satisfy the *'high standards for fair dealing' required of the United States* in controlling Indian Affairs."
>
> (Emphasis Supplied)[26]

[26]See also the Analysis in Cohen, *Handbook of Federal Indian Law* (1945) P 51-66.

It is also evident that long before the end of the Treaty system of Indian Government and the advent of legislative control in 1871 (16 Stat 544) Congress had evinced its own attitude toward Indian Relations. In support of this proposition the Ordinance of 1787 recited:

> *" . . . the utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent."* (1 Stat 50, 52)
>
> (Emphasis Supplied)

It is indisputable that even when original Indian Title to land was taken, compensation was to be paid, to say nothing of private rights in allotments given by solemn treaty to individual Indians.

But let us again examine the Treaty itself and quote verbatim Article 8 thereof:

> "No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force or validity as against said Indians *unless executed and signed by at least a majority of all adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him as herein before provided."*
>
> (Emphasis Supplied)

It is the respondents' contention that the above treaty provision[27] was *not complied with* when the Tribe attempted incorporation under the *Wheeler-Howard Act* of June 18, 1934 (48 Stat 984) according to the certificate of referendum election when the votes for ratification were cast,[28] there were only 529 votes cast out of only 744 eligible voters.

[27]Treaty of 1868, cited supra, Art. 8.

[28]November 7, 1936 (corporate charter Northern Cheyenne) see Appendix C-7.

The official count of these votes were as follows:

Votes in favor or the acoption of charter	448
Votes opposed to adoption of charter	73
Votes rejected as illegal or spoiled	8
Total cast	529

There is no way this figure could possibly represent *"a majority of all adult male Indians occupying or interested in the same . . . "*[29] as petitioner admits in his brief, there are 3,600 enrolled members.[30]

The votes cast included also, male and *female votes* and assuming that as much as two-thirds (2/3), were male, it represents *only about 298 male voters.*

Therefore, even allowing for births and deaths, this figure could not represent a majority of adult males in *November 1936,* and therefore, *no lands could have been ceded to the tribal corporation, and certainly the tribal corporation could not have received any mineral estate.* In addition, respondents hasten to add that none of these figures include *unenrolled* Cheyennes who may be *"interested".* (Cited Supra)[31]

It is also true, that none of the owners of tracts of land *gave their consent to the taking of any mineral estate.* (See again, Art. 8, last paragraph cited supra).

4. The Act of June 3, 1926

The Northern Cheyenne Allotment Act of June 3, 1926 (44 Stat 690) predicated upon, and having its

[29]Treaty of 1868, Art. 8, et seq.

[30]See page four of his brief submitted December 12, 1975.

[31]44 Stat 690.

legal efficacy dependent upon, and derived from, the Treaty of 1868 (cited supra) was in abrogation of said treaty. The provision[32] granting the minerals beneath allotted lands to the tribe was in abrogation of the Treaty of 1868.[33] The allottees did not give their consent to this conveyance by the Congress as required by the Treaty.

Assuming, however, that 44 Stat 690 is valid, an examination of its terms demonstrate the expressed intent of the Congress. Section 3 of the act reads as follows:

> "Sec. 3. That the timber, coal, or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: Provided, *that at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs.* Provided further, that the unallotted lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient* for the benefit of said Indians."
>
> (Emphasis Supplied)

This gave the allottees a vested remainder interest in the mineral estate following the tribe's estate per term of fifty years.

Respondents confidently contend that reasonable, prudent, english speaking persons everywhere would

[32]44 Stat 690, Section 3.

[33]Treaty of 1868; Art. 8, last paragraph, cited supra (See appendix A-1 to A-7).

agree, just as the circuit Court mandated, that the language in this critical section of the Act was "*. . . simple and plain and its meaning clear to common understanding*". (emphasis supplied; No. 73-1545 et al, page 6; 505 F2d 268; 59 F2d 654, 655.)

The Northern Cheyenne Allotment Statute, (44 Stat 690) is similar to a Crow Allotment Statute of June 4, 1920 (41 Stat 751) which was amended in 1959. (73 Stat 565) *Both* of these statutes reserve minerals to the tribes for a period of fifty (50) years, and *both* provide that at the end of the fifty (50) year period, the minerals will become the property of the allottee, etc.

In the Crow statute, however, Congress *qualified* the future interest created in the allottee by this phrase: "*. . . unless otherwise ordered by Congress*". (Emphasis supplied. cited supra).

A similar phrase "*. . . unless otherwise provided for by Act of Congress . . .*" (emphasis supplied) also appears in Paragraph 7 of Section II of the Osage allotment Act of June 28, 1906. (34 Stat 539)[34]

Congress deliberately omitted this *qualifying* phrase from the Northern Cheyenne Act clearly showing an expressed intention to pass a vested interest in the allottees of these minerals (44 Stat 690, Section 3, cited supra). *This is the crucial salient point.* The allottees' rights to equitable title vested upon com-

[34]Among the allotment acts using the *"unless otherwise provided for by Act of Congress"* clause in addition to the Crow and Osage Acts cited supra., is the Standing Rock and Cheyenne River Reservations; (35 Stat 460) of May 29, 1908; The Blackfeet Indian Reservation (41 Stat 17) of June 30, 1919, and the Fort Belknap Indian Reservation (41 Stat 1355) of March 3, 1921.

NOTE: that all these statutes were passed prior to the Northern Cheyennes' allotment Act here at issue.

pletion of their allotment applications[35] and the minerals pass with the equitable title.[36]

The *Wheeler-Howard Act*, Act of June 18, 1934, 48 Stat 984, terminated allotment of tribal land and only allotment applications perfected as of that date were issued. (See *Allotment Selections on The Fort Belknap Indian Reservation*, 55 I.D. 295 (1935). All the allotments were completed by 1934 on the Northern Cheyenne Reservation, but the granting of patents is merely ministerial, and can be enforced by the Court so that argument is academic anyway.[37] In the *Arenas* case, the Indian was held to have an equitable title *even before the approval of the allotment selection*, which was therefore an inheritable interest.[38]

Any other interpretation of the Cheyenne Act would do deliberate violence to the express wording of that Act.

[35]*Arenas v. United States*, 322 U.S. 419 (1944); *Wyoming v. United States*, 255 U.S. 489 (1921); *Payne v. New Mexico*, 255 U.S. 367 (1921); *Right of Indians to Allotments in San Juan County, Utah*, 57 I.D. 547 (1942); *Allotment Selections on the Fort Belknap Indian Reservation*, 55 I.D. 295 (1935); *Raymond Bear Hill*, 52 I.D. 688 (1929); *Benson Mine & Smelting Co. v. Alta Min. & Smelting Co.*, 145 U.S. 428 (1892).

[36]*Mott v. United States*, 283 U.S. 747 (1931); *Wyoming v. United States*, 255 U.S. 489 (1921); Particularly, please see *Raymond Bear Hill*, 52 I.D. 688 (1929) which held an amendment to an allotment act reserving the minerals to the tribe *did not affect allotments applied for prior to passage of the amendment.*

[37]*United States v. Arenas*, 158 F2d 730.

[38]Cited Supra.

5. Is the Statute of June 3, 1926, (44 Stat 690) Ambiguous, or of an Obscure or Doubtful Meaning?

Petitioner in his brief, continually contends that the provisions of 44 Stat 690 are *"explicit"*. (See peititoner's own brief, page 13, et seq.).

Respondents could not agree more, but cannot agree with respondents as to the *plain meaning* of the words. Petitioner urges the Court that Congress did not intend to pass a present vested interest to the allottees and contend that the following phrase supports the position:

> "Sec. 3. . . . Provided further, that the unallotted lands of said tribe shall be held in common, *subject to the control and management thereof as Congress may deem expedient* for the benefit of said Indians."
>
> (Emphasis Supplied)

Here, Congress spells it out clearly referring to *"unallotted lands"* held in common. If Congress could vest the minerals beneath the allotments at all by the 1926 Act to the Tribe, it did so for a mere term of fifty (50) years. It did not qualify the interest by any *reserving clause or phrase.*

This was not a mere oversight of the Congress, and I know of no words they could have used that would make it any clearer. The Ninth Circuit agreed and mandated that the words of 44 Stat 690 were *"simple and plain, and its meaning clear to common understanding"* (emphasis supplied). No. 1545 et al, Opinion of October 17, 1975, 505 F2d, 268, Quoting 59 F2d, at 655, the Circuit Court further declared:

> "In the plain words of the statute, the minerals were simply reserved, or set aside, for the benefit

> of the tribe for a fixed term of fifty years thereafter to become the property of the allottees, *with no conditions attached to their receipt of these minerals."*
>
> (Emphasis Supplied)
> (Cited Supra)

6. Assuming the Statute to be Ambiguous, should the Ambiguity be Resolved in Favor of the Respondent Class of Allottees, Heirs and Devisees?

Where there is ambiguity in the Statute in question, Judicial notice of, and resort to, the legislative journals to determine the intent of the legislature is permitted. *But it must be ambiguous.* (Please see *Jones on Evidence*, Sixth Edition, Section 2:22; and *Wiseman v. Madison Cadillac Co.* 191 Ark. 1021, 88 S.W.2d, 103 A.L.R. 1208. Similarly, notice will be taken of the fact that a certain bill was intended to *effectuate a particular change of public policy and that it failed of passage in the legislature.* (See *Jones On Evidence*, Sixth Edition, Section 2:22, et al; and, *Crook v. Commonwealth*, 147 Va. 593, 136 S.E. 565, 50 A.L.R. 1043; and *the petitioner's proposed bill that was not enacted into legislation.*

If there be ambiguity, then it is the respondents contention that that ambiguity must be resolved against the United States Government who drafted said legislation, and against its extended arm of corporate creation, the Tribal Corporation, and in favor of the weak and defenseless individual Cheyennes, collectively comprising the entire class of allottees, heirs and devisees. (Please see Federal Incorporation Act of June 18, 1934; (48

Stat 984) and respondents' brief submitted May 21, 1973, page 4, and the case of *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Petitioners' Exhibits, themselves, serve to confirm the respondents' position, that the omission of the qualifying similar phrases found in other statutes that preceeded the Northern Cheyenne Act, such as "*. . . unless otherwise provided for by act of Congress* . . . (emphasis supplied)", was not a mere oversight, but resulted from *debate* and *deliberation*, and was the *intended, deliberate* and *premeditated act* of the United States Congress. (Please see petitioner's own Exhibits A-2 through A-10 and B-3 through B-9, submitted in support of the petition for rehearing in the Circuit Court and, *Adams et al v. Osage Tribe of Indians*, 50 F2d 918 (D.C. Oklahoma 1931); 59 F2d 653 (10th Cir. 1932), and *Taylor v. Tayrien*, 51 F2d 884 (Cca 10th 1931) both interpreting the same Osage allotment Act, and *British-American Oil Producing Company v. Board of Equalization*, et al, 299 U.S. 159, 81 L.Ed. 95, 98 (1937), and respondents' brief of May 21, 1973, pages 1 through 11.)

Petitioners arguments that the *Adams* case should not have application here because petitioners and respondent are on an equal footing is inaccurate and erroneous at best. The illiterate individual Cheyenne Indian is the one most in need of the protection of this Court, and not the fictitious artificial legal corporate

entity which is capable of perpetual existence.[39] (See corporate Charter of the Cheyenne Tribe of November 7, 1936).

In short, the individual, like this Court, possess neither the "purse" nor the "sword", while the Tribal Corporation controls large sums of money, has perpetual existence, maintains a police force, and *a retained corporate attorney*, and possess and performs many of the attributes of sovereignty. (See Corporate Charter and By-Laws, cited supra.)

Therefore, the *Adams* case (cited supra) applies here just as the 9th Circuit Court perceived:

> *"Treaties and legislative Acts relative to Indians should be construed as illiterate people would understand them."*
>
> (Emphasis Supplied)

It is then a fortiori, that any ambiguity should be resolved in favor of the allottee beneficiaries, and not the Tribal Corporation.

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[39] *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 657, 4 L.Ed. 629; *U.S. v. Trinidad Coal Co.*, 137 U.S. 160, 11 S.Ct. 57, 34 L.Ed. 640; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 F. 585, 30 C.C.A. 293; *Porter v. Railroad Co.*, 76 Ill. 573; *Nebraska Wheat Growers' Assn v. Smith*, 115 Neb. 177, 212 N.W. 39, 44; *State v. Thistle Down Jockey Club*, 114 Ohio St. 582, 151 N.E. 709, 711; *Congdon v. Congdon*, 160 Minn 343, 200 N.W. 76, 87; *Forest City Mfg. Co. v. International Ladies Garment Workers Union Local No. 104*, 233 Mo. App 935, 111 S.W.2d 934; *In Re Crown Heights Hospital*, 183 Misc. 563, 49 N.Y.S.2d 658, 660; *Froelich and Kuttner, of Manila, P.I. v. Sutherland*, 57 App. D.C. 294, 22 F2d 870, 872, *Black's Law Dictionary*, Revised Fourth pp 409-412.

7. What is the Significance of Indian Lobbying?

An examination of the Indian petition on its face shows that 493 Northern Cheyenne Indians wanted allotments (See petitioner's Exhibits A-2, A-3, and A-4, filed in the Circuit Court for rehearing), although even as to that fact the *Indians were divided.* (See petitioner's Exhibit A-5, paragraph 2, second sentence.)

Of the approximately 1,408 enrolled Northern Cheyennes residing on the reservation at the time of the petition was allegedly drafted and executed (the petition itself is *undated*, see petitioner's Exhibit A-11, Circuit Court), only 493 subscribed by signing or making their marks (See, also, petitioner's Exhibits A-8 through A-49).

This number represents a little over one-third of the total number of enrollees, not even a bare majority. Further examination of the names themselves reveal that about 171 of the signatures or marks are women and in many instances, the same hand penned different signatures. Some of the remaining signatures were undoubtedly children. It is evident that the requirements of the 1868 Treaty (cited supra), requiring the consent of at least a majority of all adult male Indians *"occupying"* or *"interested"* in the same has not been met, and the *"consent"* of each allottee was certainly not obtained, to divest him of his interest in his allotment as required by the Treaty (cited supra).

However, taking petitioner's Exhibits at face value in their most favorable interpretation, they simply show a special interest group of Northern Cheyenne Indians lobbied Congress for a bill alloting lands reserving minerals to the natural band or tribe of Northern

Cheyenne Indians, who collectively substantially compose respondents' class.[40]

This group of lobbyists were unsuccessful in its efforts and the bill was not passed in the form they apparently desired. (See petitioner's Exhibits B-7, B-8 and B-9 in 9th Circuit Court) although even that bill also interestingly gave the minerals to the allottees after fifty (50) years; (See paragraph one of Section 2, petitioner's Exhibits, 9th Circuit Court, B-8 and B-9).

For a further example, this same group apparently wanted *320 acres* per allotment, (See petitioner's Exhibits A-11, 4th line) which was curiously the same number named in *the Treaty of 1868*, Section 3, (cited supra), also, the proposed bill petitioners Exhibit B-8 (4th line) only 80 acres was drafted.[41]

Congress saw fit, however, to grant only *160 acres* to each allottee in the bills final form. (Act of 1926; 44 Stat 690).

Petitioners propose then, that this Court rewrite the 1926 Allotment Act, not only as to the mineral rights, but also to reduce or enlarge the acreage of the allotments; 80 acres, 160 acres, 320 acres, or perhaps 50 acres, or 1000 acres!!!

RESPONDENTS THINK NOT!

However, it is the respondents' position that the allottees interest in his allotments vested him 320 acres under the Treaty of 1868 (Sec. 3, cited supra) and this included the mineral estate.

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[40]Tribe Incorporated after Act of June 18, 1934 (48 Stat 934).

[41]Also, 80 being the number of acres mentioned in the Treaty of 1868, Sec. 3, for persons " . . over 18 years of age not being head of a family, . . . " (cited supra).

These Exhibits show only evidence of Indian Lobbying for the most part, and therefore, have no greater significance. It cannot be said to reflect a change of policy of Government which was at the time, the allotment system until 1934. (Act. cited supra).

8. Definitions

It may be helpful to review, at this juncture, basic definitions of the words "vested", "property" and "rights".

The Oxford English Dictionary, Vol. XII, reprint 1961, page 160:

> "Vested . . . established, secured, or settled in the hands of, or *definitely assigned to, a certain possessor.*"
>
> (Emphasis Supplied)

again:

> "1766 Blackstone Comm. II 168, *Vested remainders . . . are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent.*"
>
> (Emphasis Supplied)

In Black's Law Dictionary, Revised Fourth Edition (1968) Page 1734:

> "*Vested.* Fixed; accrued; settled; absolute. Orthwein v. Germania Life Ins. Co. of City of New York, 261 Mo. 650, 170 S.W. 885, 888. Having the character or giving the rights of absolute ownership; *not contingent; not subject to be defeated by a condition precedent.* Scott v. West 63, Wis. 529, 24 N.W. 161; McGillis v. McGillis, 11 App. Div 359, 42 NYS 924; Smith v. Proskey, 39 Misc. 385, 79 NYS 851.
>
> (Emphasis Supplied)

again: (cited supra)

> "*Vested estate* . . . estate by which present interest is invariably fixed to remain to determinate person on determination of preceding freehold estate. Story v. First Nat. Bank & Trust Co. in Orlando, 115 Fla. 436, 156 So 101. An estate, when the person *or the class which takes the remainder is in existence or is capable of being ascertained when the prior estate vests.* Commissioner of Internal Revenue v. Kellog, C.C.A. 3, 119 F.2d 54, 57; or when there is an immediate right of present enjoyment or a present right of future enjoyment. In re Kelly's Estate, 167 Misc. 751, 4 N.Y.S.2d 675, 678.
>
> (Emphasis Supplied)

Black's (cited supra) page 1735:

> "*Vested Interest . . . A future interest not dependent on an uncertain period or event, or a fixed present right of future enjoyment.* In re Whiting, D.C.N.C., 3 F.2d 440, 441; McMannis v. Peerless Casualty Co., 114 Me. 98, 95A. 510. *When a person has a right to immediate possession on determination of preceding or particular estate.* In re Clark's Estate, Orph, 13 N.J. Misc. 393, 178A. 574, 575. One in which there is a present fixed right, either of present enjoyment or of future enjoyment. Painter v. Herschberger, 340 Mo. 347, 100 S.W.2d 532, 535.
>
> (Emphasis Supplied)

"Property" in the Oxford English Dictionary Vol. VIII reprint, 1961, page 1471, is defined:

> "a *That which one owns;* a thing or things belonging to or owned by some person or persons, a possession (usually material) or possessions collectively; (one's) wealth of goods."
>
> "b A piece of land owned; *a landed estate.*
>
> "c Something belonging to a thing; an appurtenance; an adjunct."
>
> (Emphasis Supplied)

Black's Law Dictionary Revised, Fourth Edition, page 1382, defines "property":

> "*Property*. That which is peculiar or proper to any person; . . . *in the strict legal sense, an aggregate of rights which are guaranteed and protected by the government.* Fulton Light, Heat & Power Co. v. State, 65 Misc. Rep. 263, 121 N.Y.S. 536. *The term is said to extend to every species of valuable right and interest.* McAlister v. Pritchard, 230 S.W. 66, 67, 287 Mo. 494."
>
> (Emphasis Supplied)

Again, Black's (cited supra) at page 1383:

> "Private property. *As protected from being taken for public uses*, is such property as belongs absolutely to an individual . . ."
>
> (Emphasis Supplied)

Again, Black's (cited supra) at Page 1383:

> "Real Property. Land, and generally . . . *Also rights issuing out of, annexed to, and exercisable within or about land*; a general term for lands, tenements, and hereditaments; property which on the death of their owner intestate, passes to his heir. Ralston Steel Car Co. v. Ralston, 112 Ohio St. 306, 147 NE. 513, 516, 39 ALR 334."
>
> (Emphasis Supplied)

The term "right" has been defined extensively both in the Oxford English Dictionary, reprint, 1961 Vol. VIII, page 669, and in Black's Law Dictionary, Fourth Edition (1968), pages 1486 and 1487, and depends upon whether it is used as a noun or adjective, abstract or concrete, perfect or imperfect, primary or secondary, absolute or qualified, etc.

We are considering the term "right" here as it pertains to a right in rem:

> "A right in rem is one which imposes an obligation on persons generally; i.e. either on all the world or

> on all the world except certain determinate persons. Thus, if *I am entitled to exclude all persons from a given piece of land, I have a right in rem in respect of that land; and if there are one or more persons, A., B., and C., whom I am not entitled to exclude from it, my right is still a right in rem.*"
>
> (Emphasis Supplied)

And, this right as it applies to Constitutional Law is a *civil right* and as such belong to *every citizen* of the State or Country. (Emphasis Supplied)

See Black's (cited supra) page 1487:

> ". . . They included the rights of *property*, marriage, *protection by the laws*, freedom of contract, trial by jury, etc. Winnett v. Adams, 71 Neb. 817, 99 N.W. 681; or, as otherwise defined, civil rights are rights appertaining to a person *in virtue of his citizenship in a state or community*. Rights capable of being enforced or redressed in a civil action. Also a term applied to *certain rights secured to citizens by the United States* . . ."
>
> (Emphasis Supplied)

It is also well established, and giving to the term a juristic content:

> "A 'right' is well defined as 'a capacity residing in one man of controlling, with *the assent and assistance of the state the actions of others*' . . . Hall. Jur. 69."
>
> (Emphasis Supplied)

(See Black's, cited supra, page 1486)

It is clear from a review of these terms, that respondent class received a vested property right in their allotments, including the minerals, a right in rem, guaranteed by the Constitution, a present vested right of future enjoyment, upon the expiration of the fifty (50) year period in the tribe by the 1926 Act. (cited

supra). This is true of course, only if they did not already take allotments, including the minerals, under the treaty of 1868 (cited supra).

9. Plenary Powers of Congress not Absolute

Petitioner has cited authorities which he claims demonstrate that the Congress need not expressly reserve the right to reallocate tribal property in order to retain it. Here again, he refers to *tribal property* and fails or refuses to note the distinction in *private property, to-wit: the allotments.*[42] Petitioner's Cases are not on target and are out of point.[43] These cases then all involve lands held in common, unallotted land, tribal land and not vested allotments, where Congress could exercise its plenary power "... *to give to these people full protection in their persons and their property* ..." (emphasis supplied) in *U.S. v. Thomas*, 151 U.S. 577,

[42]See petitioner's brief in support of certiorari, and on the merits of December 12, 1975.

[43]*United States v. Jim*, 409 U.S. 80 (197_) involves distribution of royalties from *tribal lands*, thus correctly applying the *Gritts* rule for the reallocation of tribal property.

Chase Jr. v. United States, 256 U.S.1, (1921) this case pertained to a statute terminating allotment prior to Chase *selecting* it, and therefore, no private rights vested. Thus land remained *tribal land*, and could be reallocated.

United States v. Rowell, 243 U.S. 464 (1917) involved an allotment application of a *non*-Indian which was revoked prior to issuance of patent. Thus, again *tribal lands* were involved.

Sizemore v. Brady, 235 U.S. 441 (1914) this case involved inheritance rights in an allotment *when the allottee died prior to actually receiving the allotment*. Again, *tribal land.*

Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920) involved *unallotted*, or *tribal land* given to railroad.

585, (1894). Also, in the case of *Morrison v. Work* 266 U.S. 481 485 (1925) the Court declared:

> "It is admitted that, as regards *tribal property* subject to the control of the U.S. ... Congress may make such changes in the management and disposition as *it deems necessary to promote* their welfare."
>
> (Emphasis Supplied)

But, in *U.S. Alcea Band of Tillamooks*, et al, No. 26, 329 U.S. 40 (1946) the Court mandated with regard to the power of Congress to regulate Indian Affairs:

> "... although plenary, *it is not absolute*..."
>
> (Emphasis Supplied)

Even so, this highest court had so said as early as 1899.[44] Other cases cited by petitioner involve *personal status* of the parties and not private property rights as such. (Privileges such as citizenship, treaty rights, peculiar to Indian persons, wardship, etc.[45] Therefore, these cases again are not in point. Besides *mere enrollment* for the purpose of Indian allotments of land concern property rights and cannot be taken away without notice and an opportunity to be heard. (See *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 62 L.Ed. 309, 38 S.Ct. 99; and, *U.S. ex rel Turner v. Fisher*, 222 U.S. 204, Ed. 165, 32 S.Ct. 37.)

[44]Stephens v. Cherokee Nation, 174 U.S. 455, 478, 19 S.Ct. 722, 734, 43 L.Ed. 1041.

[45]Lowe v. Fisher, 223 U.S. 95 (1912); Wallace v. Adams, 204 U.S. 415 (1907); Stephens v. Cherokee Nation, 174 U.S. 455 (1899).

Other cases cited by petitioner deal with the Indians personal status as a ward and have again no application to the case at bar.[46]

The case of *Sweet v. Schock*, 245 U.S. 192 (1917) which petitioner also contends support his position, pertains to whether a tax redemption runs with the land and reversion when passing beyond *Indian* ownership. The tax exemption was held to cease when passing to a *non*-Indian.

The United States Supreme Court said, per Mr. Justice Van Devanter in 1937, in the case of Chippewa Indians v. U.S., 301 U.S. 358:

> ". . . Our decisions, while recognizing that the government has power to *control and manage the property* and affairs of its Indian Wards *in good faith for their welfare*, show that *this power is subject to constitutional limitations* and does not enable the government to *give lands of one tribe or band to another, or to deal with them as its own . . .*"
>
> (Emphasis Supplied)
> pp 375-376

Again in *U.S. v. Alcea Band of Tillamooks*, (cited supra) confirming former case holdings, the Court said:

[46]United States v. Jackson, 280 U.S. 183 (1930) involved question of whether Congress can extend the period of the restraint on alienation of trust allotments; Brader v. James, 246 U.S. 88 (1918); Williams v. Johnson, 239 U.S. 414 (1915); United States v. Bartlett, 235 U.S. 72 (1914); Hickman v. United States, 224 U.S. 413 (1912); Goat v. United States, 224 U.S. 458 (1912); and, Tiger v. Western Investment Co., 221 U.S. 286 (1911). These cases all have little, if anything to do with property rights. Goat, Hickman, Brader and Jackson cases really just reaffirmed Tiger which is the leading case that held that the restraint on alienation was an attribute of the Indian's Wardship. Personal status, again not pertaining to property rights.

> *"It does not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes without rendering, or assuming an obligation to render just compensation for them."*
>
> (Emphasis Supplied)

Here we have conclusively established that even as to *tribal lands* the Congresses' power is not absolute, to say nothing of private allotments vested pursuant to Treaty or Congressional Act. (Cited Supra).

Petitioner would have this High Court condone, confirm and enforce the taking of private property (the minerals) from individual Indians and give them forever to the Tribal Corporation.

THIS IS NAKED CONFISCATION.

10. Violation of Fifth Amendment AND CHOATE V. TRAPP[47]

The 1968 Act[48] is without a doubt retroactive legislation seeking to divest the allottees, heirs and devisees of their minerals beneath the allotted lands and to vest these mineral rights in perpetuity in the Tribal Corporation.[49]

The 9th Circuit Court mandate rests squarely upon this High Court's mandate in the celebrated case of Choate v. Trapp, 224 U.S. 665 of 1912. This precedent has been followed in at least twenty seven Federal

[47]224 U.S. 655, 675 (1912) The Legal Services motions under Rule 5(1) are in error. This writer first cited the *Choate v. Trapp* case in the District Court brief *first submitted* August 14, 1972.

[48]82 Stat 424, 425.

[49]Ninth Circuit Court Mandate of October 17, 1974; No.-73-1545, et al.

Court decisions. Nine of these are U.S. Supreme Court decisions.[50] Amendment V of the U.S. Constitution declares:

> *"No person shall be . . . deprived* of life, liberty or *property*, without due process of law: *nor shall private property be taken for public use, without just compensation.*"
>
> (Emphasis Supplied)

Obviously, this case at "first blush" is a governmental taking of private personal property to give to a Federal Corporation and can hardly be considered a "public use".[51]

Whenever the power of eminent domain is conferred or delegated to some corporation or municipality, and nothing is expressly stated about the estate to be taken, the power is usually strictly construed, so that only

[50] *English v. Richardson*, 224 U.S. 680 (1912); *Gleason v. Wood*, 224 U.S. 679 (1912); *Sizemore v. Brady*, 235 U.S. 441, 449 (1914); *Williams v. Johnson*, 239 U.S. 414, 419 (1915); *Ward v. Love County*, 253 U.S. 17, 20, 21 (1919); *Carpenter v. Shaw*, 280 U.S. 363, 365, 366 (1929); *Mott v. United States*, 283 U.S. 747, 752 (1931); *County of Mahnomen v. U.S.* 319 U.S. 474, 476 (1943); *Oklahoma Tax Comm. v. United States*, 319 U.S. 598, 603 (1943). These cases expressly agree with *Choate's* Constitutional protection of individual Indian's property rights and should not now be overruled.

[51] Whether the Courts have power to review a determination of the lawmakers that a particular use is a "*public use*" was left hanging in *U.S. ex rel T.V.A. v. Welch*, 327 U.S. 546 (1946). However, Justice Frankfurter interpreted the controlling opinion and said: " . . . *whether a taking is for a public purpose is not a question beyond judicial competence.*" (emphasis supplied). Other decisions supporting this dicta are *U.S. v. Gettysburg Electric Ry.*, 160 U.S. 668, 680 (1896); *Rindge Co. v. Los Angeles*, 262 U.S. 700, 709 (1923); *Old Dominion Co. v. U.S.*, 269 U.S. 55, 66 (1925); *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930).

such an estate may be taken as is necessary for the public purposes intended, but this is entirely a matter of construction and not of constitutional power (*Fairchild v. St. Paul*, 46 Minn. 540).

An invasion of the air above the ground, as well as pollution of it by smoke has been held a wrongful taking of property, as has pollution of surface and subsurface waters by acid or byproducts.[52]

It is the individual respondent class's opinion that the 1968 Amendment[53] that places upon the Tribal Corporation the onus of bringing this class action to determine the constitutionality of the same Act that endeavors to take title to the minerals from the respondent class and vest it forever in the Tribal Corporation is an open naked and notorious act of confiscation by the U.S. Congress.[54] No provision is even made for attorney fees or costs for thrusting this unwanted litigation on the individual allottees, who are for the most part, indigents except for their allotted lands. An injunction should have property issued in the Lower Court upon a determination of the fair value of the property already taken.[55]

[52] *U.S. v. Causby*, 328 U.S. 256 (Other cases cited herein).

[53] 82 Stat. 424, 425.

[54] P.L. 90-424, 82 Stat 424, which amended Section 3 of the 1926 Act reads as follows: "(a) *The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe* and may be leased with the consent of the Indian Council for mining purposes . . . under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.". (Emphasis Supplied).

[55] See litigation history in this brief and the prospecting permit and lease moneys paid to the Tribal Corporation by Order of September 29, 1972. (See case of *Galway v. Elevated Railway*, 128 N.Y. 132.).

Approximately sixty two (62%) per cent of the Northern Cheyenne Indian Reservation is already owned by the Tribal Corporation, and may be leased, or mined regardless of the outcome of this litigation. Only the remaining thirty seven (37%) per cent owned by allottees, heirs or devisees is here in issue.

Such retroactive legislation had to have been motivated by Congressional desire to vest all minerals in the Tribal Corporation, so that coal and oil companies might escape negotiations with fractional Indian interests.[56]

Such retroactive legislation, born of political and economical expediency, has been repeatedly struck down as violative of the due process clause. In the case of *Nobel v. Union River Logging Railroad*, 157 U.S. 165 (1894), a revocation by the Secretary of the Interior of previous approval of plats and documents showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property.

In the case of *Danzer Co. v. Gulff R.R.*, 268 U.S. 633 (1925), the exception of the period of Federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read *prospectively only* because the limitation was an integral part of the liability, *not merely a matter of remedy*, and would violate the Fifth Amendment when retroactive.

[56]It should be remembered that the Federal Government is the Fiduciary Trustee to both the Tribe and the Indian, and this 1968 Act and previous legislation (48 Stat 934) of 1934, permitted the Fiduciary to do by the back door, that which it could not do by the front.

Rights against the United States *arising out of contract* have been repeatedly held protected by the Fifth Amendment; hence a statute *abrogating contracts* of war risk insurance was *also held unconstitutional* as applied to outstanding policies.[57]

The 1968 Amendment (cited supra) is clearly retroactive legislation abrogating the treaty of 1868 (15 Stat 655)[58] and the legislative Act of 1926 (44 Stat 690).

Congress has no authority over allotments and the minerals they contain after patents have been issued without qualifying or reserving clause such as are found in the other allotment Acts (cited supra) and which said clause is absent in the Northern Cheyenne Allotment Act (cited supra).[59]

In fact and in law, the allottee has the right to lease his minerals under 25 U.S.C. 396.

Also, the argument of petitioner that the patent issued under the 1926 Act reserved the minerals to the tribe, is of no significance whatsoever, because the Act itself limited the estate of fifty years. This Court said in *Choate v. Trapp* (cited supra):

> "Those who signed the patent could *not convey more rights* than were granted by that part of the *Curtis Act, nor could they by omission deprive* the patentee of any exemption to which he was thereby entitled."
>
> (Emphasis Supplied)

[57] *Lynch v. U.S.*, 292 U.S. 571, 579 (1934); *Perry v. U.S.*, 294 U.S. 330 (1935); *DeLa Rama S.S. Co. v. U.S.*, 344 U.S. 386 (1953); *Cf. F.H.A. v. Darlington, Inc.*, 358 U.S. 84 (1958).

[58]The Congress has *ratified the Treaty* of 1868 by every *Act of appropriation of moneys* for administering and implementing said Treaty beginning in 1869 and continuing until 1950. See Appendix B-1 and the case of *Antoine v. Washington*, 420 U.S. 194, decided by this High Court on February 1975.

[59]*Sizemore v. Brady*, (cited supra).

This Court leaves no reasonable doubt as to the application of *Choate v. Trapp* in the following principled terms:

> "Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption *than any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land.*"
>
> (Emphasis Supplied)

In Morrow, County Auditor, et al v. U.S. (1917) 243 Fed. Reporter 854, the Court further mandated:

> "The government may in its dealings with Indians *create property rights which, once vested, even it cannot alter, and such property rights* may result from *agreements either in the form of a treaty or of a statute*; the important considerations being that there should be the *essentials of a binding agreement between the government and the Indian* and the resultant *vesting of a property right in the Indian.*"
>
> (Emphasis Supplied)

The Court cited as precedents, a number of cases in support of its position.[60]

Therefore, the Ninth Circuit Court of Appeals correctly applied *Choate v. Trapp* as controlling and *Adams, et al v. Osage*, (Cited supra) pertaining to the

[60] *Williams v. Johnson*, 239 U.S. 414, 420, 36 S.Ct. 150, 60 L.Ed. 358; *Sizemore v. Brady*, 235 U.S. 441, 449, 35 S.Ct. 135, 59 L.Ed., 308; *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941; *English v. Richardson*, 224 U.S. 680, 32 S.Ct. 571, 56 L.Ed. 949; *Johnes v. Mechan*, 175 U.S. 1, 20 S.Ct. 2, 44 L.Ed.49; (Fee simple title, including minerals) and *Chase v. U.S.* 222 Fed. 593, 596, 138 C.C.A. 117.

interpretation and clear and common meaning of the statute.

Absent the qualifying phrase the allottees took a present vested interest in the minerals for future enjoyment.[61]

SUMMARY AND CONCLUSION

1. There can exist no reasonable doubt that the rights obtained by the Tribe in the unallotted land and the rights obtained by the individual Indians in the allotments by the Treaty of 1868 (15 Stat 655) conveyed both the surface and subsurface rights.

Failure to reserve the minerals to the United States, or anyone else, it conveyed them and the Treaty must be construed against the United States and in the most favorable light, to the illiterate Indian Wards. It must be construed liberally for the Indians and the words taken in their plain meaning and common understanding.[62]

2. The Executive Orders of both Presidents Arthur and McKinley further circumscribing and enlarging the reservation was a further recognition of the 1868 Treaty and constitute subsequent executive ratifications of the rights of the Indians.

3. Appropriations of money for the administration and implementation of the 1868 Treaty,[63] beginning

[61] See *Crow, Osage, Standing Rock, Blackfeet,* and *Fort Belknap* attotment acts, cited supra herein, and cases of *Taylor v. Tayrien*, 51 F.2d 884, and *British-American Oil Producing Co. v. Board of Equalization of the State of Montana*, et al 299 U.S. 158, and *Adams*, cited supra, interpreting.

[62] Adams et al v. Osage et al, 50 F.2d 918.

[63] See Appendix B-1 Analysis of GAO Report, Pet. Ex. 113.

with 16 Stat 15, in 1869 and ending with 64 Stat 1052, in 1950, were all subsequent Congressional recognition and repeated ratifications of the Treaty.[64] after all hostilities ceased.

4. The Northern Cheyenne were granted citizenship by the Act of June 2, 1924 (43 Stat 253) removing any pre-existing doubt as to whether Indians were entitled to Constitutional protections.

5. The allotment system existing from 1868 all the way through to 1934 envisioned the final passing of a fee simple title to the allotments, unless a reserving or qualifying clause was inserted, and this included the minerals.[65] This was the stated policy of the government during that time.[66]

6. The allotment Act of June 3, 1926 (44 Stat 690) confirmed and was a further recognition by the United States of the vested property rights in the Cheyenne, including the minerals. However, the Section reserving the minerals to the Tribe for fifty years was in abrogation of the allotments given unqualifyidly to the individual Northern Cheyenne in the 1868 Treaty.

7. In either event, the minerals were reserved to the natural band or tribe and not the Tribal Corporation for a mere term of fifty years, and the 1926 Act contained no other qualifying or reserving clause, as did all other allotment Acts passed prior to the Cheyenne Allotment Act.

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[64]Antoine v. Washington, 420 U.S. 194, 43 L.Ed.2d 129 95 S.Ct. 944, 43 U.S. L.W. 4257, (Feb. 19, 1975).

[65]Allotment Acts cited herein heretofore; and 1 Op Atty General William Wirt cited supra.

[66](Cited supra).

8. The Tribe did not incorporate, if at all, until after the Act of June 18, 1934 (48 Stat 934), because the Treaty provisions for ceding both tribal land and the mineral estate in the alloted lands were not complied with.

9. The intent of the Congress when the 1926 Act was passed was to compel the Indian to follow the Whitemans Agrarian way of life.

10. Issuance of fee patents are ministerial acts merely, and are enforceable in the Courts.

11. There has been a wrongful and shameful taking of the vested property rights in the minerals beneath the allotted lands within the meaning of the Fifth Amendment that requires just compensation.[67]

12. The 1968 Act (82 Stat 424, 425) is retroactive legislation and void ab initio, and unconstitutional and was an act of deliberate naked confiscation.

The main pivotal issue and all collateral and ancillary issues should be resolved in favor of the respondent class of allottees, heirs and devisees.

All prospecting permit and lease moneys should be returned to the respondents and they should be declared the equitable owners of the minerals beneath their allotments, and in 1976, the legal owners of the minerals. Just compensation including attorney fees and court costs should be awarded, along with permanent injunctive relief and further, the Ninth Circuit Court of Appeal decision affirmed.

Common sense requires but one possible decision, for if this case had involved any other citizens other than redmen, the controversy would long ago have ended in their favor.

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[67]*Choate v. Trapp*, cited supra, et seq.

Respondents confidently contend this Court will not reduce the Indian to something less than a full citizen and will not, as petitioner urges, reduce this Court from a fountain head of justice to an arena of political and economical expediancy.

"Jus Est Norma Recti; Et. Quicquid Est Contra Normam Recti Est Injuria."

For the reasons stated, it is respectfully submitted that the judgment of the Ninth Circuit Court of Appeals below, should be affirmed.

Respectfully submitted,

LEWIS E. BRUEGGEMANN
Office and Post Office Address
256-7-8 Hart Albin Building
Billings, Montana 59101
Attorney for Respondent Class

January, 1976

APPENDIX A

TREATY

BETWEEN

THE UNITED STATES OF AMERICA

AND THE

NORTHERN CHEYENNE AND NORTHERN ARAPAHOE TRIBES OF INDIANS.

CONCLUDED MAY 10, 1868.
RATIFICATION ADVISED JULY 25, 1868.
PROCLAIMED AUGUST 25, 1868.

ANDREW JOHNSON.

PRESIDENT OF THE UNITED STATES OF AMERICA.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a treaty was made and concluded at Fort Laramie, in the Territory of Dakota, on the tenth day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant General William T. Sherman, Brevet Major General William S. Harney, Brevet Major General Alfred H. Terry, Brevet Major General C. C. Augur, John B. Sanborn, and S. F. Tappan, Commissioners, on the part of the United States, and Wah-Toh-Nah, Bah-T...-Che, and other Chiefs and Headmen of the Northern Cheyenne and Northern Arapahoe tribes of Indians, on the part of said Indians, and duly authorized thereto by them, which Treaty is in the words and figures following, to wit:

Articles of a Treaty made and concluded at Fort Laramie, Dakota Territory, on the tenth day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the under-signed chiefs and headmen of and representing the Northern Cheyenne and Northern Arapahoe Indians, they being duly authorized to act in the premises.

ARTICLE I.

From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly

agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United shall be reimbursed therefor.

ARTICLE II.

The Indians, parties to this treaty, hereby agree to accept for their permanent home some portion of the tract of country set apart and designated as a permanent reservation for the Southern Cheyenne and Arappahoe Indians by a treaty entered into by and between them and the United States, at Medicine Lodge creek, on the — day of October, 1867, or some portion of the country and reservation set apart and designated as a permanent home for the Brulé and other bands of Sioux Indians, by a treaty entered into by and between said Indians and the United States, at Fort Laramie, D. T., on the 29th day of April, 1868. And the Northern Cheyenne and Arappahoe Indians do hereby relinquish, release, and surrender to the United States all right, claim, and interest in and to all territory outside the two reservations above mentioned, except the right to roam and hunt while game shall be found in sufficient quantities to justify the chase. And they do solemnly agree that they will not build any permanent homes outside of said reservations, and that within one year from this date they will attach themselves permanently either to the agency provided for near the mouth of Medicine Lodge creek, or to the agency about to be established on the Missouri river, near Fort Randall, or to the Crow agency near Otter creek, on the Yellowstone river, provided for by treaty of the seventh day of May, 1868, entered into by and between the United States and said Crow Indians, at Fort Laramie, D. T.; and it is hereby expressly understood that one portion of said Indians may attach themselves to one of the aforementioned reservations, and another portion to another of said reservations, as each part or portion of said Indians may elect.

ARTICLE III.

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservations not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "Land Book" as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Northern Cheyenne and Arappahoe Land Book."

The President may, at any time, order a survey of the reservation; and when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property as between Indians and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof as may be thought proper.

Article IV.

In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are or may be settled on said agricultural reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Article V.

When the head of a family or lodge shall have selected lands, and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm for a period of three years more he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

Article VI.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservations herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimates from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods, herein named, to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date; and it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow and one well broken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

Article VII.

The United States hereby agrees to furnish annually to the Indians who settle upon the reservation a physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time on the estimates of the Secretary of the Interior as will be sufficient to employ such persons.

Article VIII.

No treaty for the cession of any portion of the reservations herein described, which may be held in common, shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as hereinbefore provided.

ARTICLE IX.

It is agreed that the sum of five hundred dollars annually for three years, from the date when they commenced to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

W. T. SHERMAN,
Lt. Gen'l.
WM. S. HARNEY,
Bvt. Maj. Gen. U. S. A.
ALFRED H. TERRY,
Bvt. M. Gen'l.
C. C. AUGUR,
Bvt. Maj. Gen'l.
JOHN B. SANBORN,
S. F. TAPPAN,
Commissioners.

Attest:
ASHTON S. H. WHITE, *Secretary.*

Wah-tah-nah,	Black Bear.	his x mark.	[SEAL.]
Bah-ta-che,	Medicine Man.	his x mark.	[SEAL.]
Oh-cum-ga-che.	Little Wolf.	his x mark.	[SEAL.]
Ichs-tah-en.	Short Hair.	his x mark.	[SEAL.]
Non-ne-se-be,	Sorrel Horse.	his x mark.	[SEAL.]
Ka-te-u-nan,	The Under Man.	his x mark.	[SEAL.]
Ah-che-e-wah,	The Man in the Sky.	his x mark.	[SEAL.]
We-ah-se-vose,	The Big Wolf.	his x mark.	[SEAL.]
Ches-ne-on-e-ah,	The Beau.	his x mark.	[SEAL.]
Mat-ah-ne-we-tah,	The Man that falls from his horse.	his x mark.	[SEAL.]
Oh-e-na-ku,	White Crow.	his x mark.	[SEAL.]
A-che-kan-koo-eni,	Little Shield.	his x mark.	[SEAL.]
Tah-me-la-pash-me,	or Dull Knife.	his x mark.	[SEAL.]

Attest:
GEORGE B. WILLIS, *Phonographer.*
JOHN D. HOWLAND.
ALEX. GARDNER.
DAVID KNOX.
CHAS. FREEMAN.
JAS. C. O'CONNOR.

And whereas the said Treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same by a resolution, in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.
July 25, 1868.

Resolved, (*two-thirds of the senators present concurring,*) That the Senate advise and consent to the ratification of the treaty between the United States and

the Northern Cheyenne and Northern Arapaho[e] Indians, made the tenth day of May, 1868.

Attest:

GEO. C. GORHAM,
Secretary.
By W. J. McDONALD,
Chief Clerk.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said Treaty.

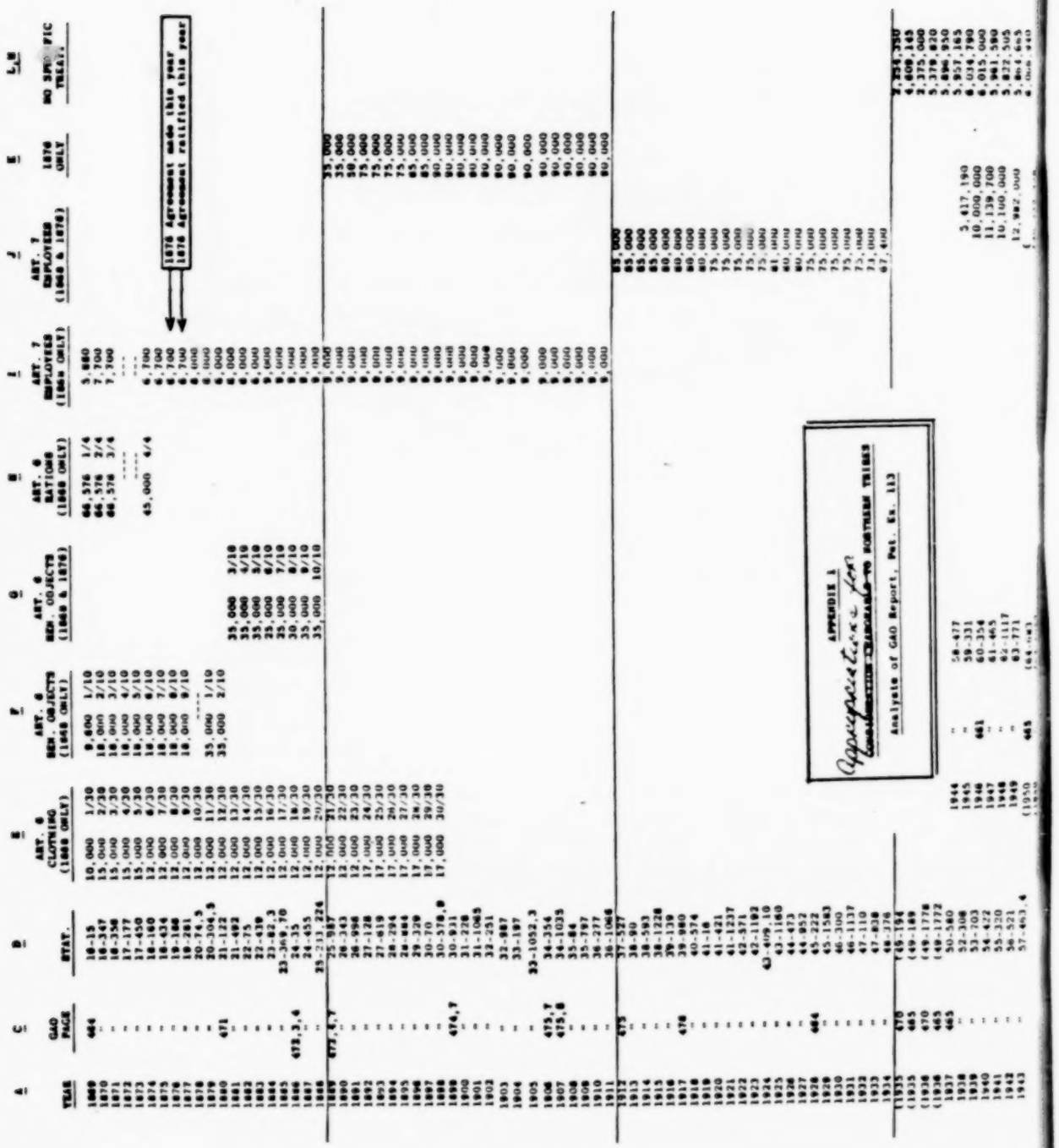
In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this twenty-fifth day of August, in the [SEAL.] year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:
WILLIAM H. SEWARD,
Secretary of State.

APPENDIX B


1876 Agreement made this year
1876 Agreement ratified this year
APPENDIX B
Appropriations Committee Hearings
Analysis of GAO Report, Pet. Ex. 113

APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

CORPORATE CHARTER

OF THE

NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION MONTANA

RATIFIED NOVEMBER 7, 1936

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

CORPORATE CHARTER OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION

A FEDERAL CORPORATION CHARTERED UNDER THE ACT OF JUNE 18, 1934

Whereas, the Northern Cheyenne Tribe of the Tongue River Reservation in Montana is a recognized Indian Tribe organized under a constitution and by-laws ratified by the Tribe on November 2, 1935 and approved by the Secretary of the Interior on November 23, 1935 pursuant to section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378); and

Whereas, more than one-third of the adult members of the Tribe have petitioned that a charter of incorporation be granted to such Tribe, subject to ratification by a vote of the adult Indians living on the reservation;

Now, therefore, I, T. A. Walters, Acting Secretary of the Interior, by virtue of the authority conferred upon me by the said Act of June 18, 1934. (48 Stat. 984), do hereby issue and submit this charter of incorporation to the Northern Cheyenne Tribe of the Tongue River Reservation to be effective from and after such time as it may be ratified by a majority vote in an election at which at least thirty per cent of the adult Indians living on the reservation shall vote.

Corporate Existence and Purposes.

1. In order to further the economic development of the Northern Cheyenne Tribe of the Tongue River Reservation in Montana by conferring upon the said Tribe certain corporate rights, powers, privileges and immunities; to secure for the members of the Tribe an assured economic independence; and to provide for the proper exercise by the Tribe of various functions heretofore performed by the Department of the Interior, the aforesaid Tribe is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Northern Cheyenne Tribe."

Perpetual Succession.

2. The Northern Cheyenne Tribe shall, as a Federal Corporation, have perpetual succession.

Membership.

3. The Northern Cheyenne Tribe shall be a membership corporation. Its members shall consist of all persons now or hereafter members of the Tribe, as provided by its duly ratified and approved Constitution and By-laws.

Management.

4. The Tribal Council of the Northern Cheyenne Tribe established in accordance with the said Constitution and By-laws of the Tribe, shall exercise all the corporate powers hereinafter enumerated.

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Corporate Powers.

5. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said Tribe, shall have the following corporate powers, in addition to all powers already conferred or guaranteed by the Tribal Constitution and By-laws:

(a) To adopt, use, and alter at its pleasure a corporate seal.

(b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:

(1) No sale or mortgage may be made by the Tribe of any land, or interests in land, including water power sites, water rights, oil, gas, and other mineral rights, now or hereafter held by the Tribe within the boundaries of the Tongue River Reservation.

(2) No mortgage may be made by the Tribe of any standing timber on any land now or hereafter held by the Tribe within the boundaries of the Tongue River Reservation.

(3) No leases, permits (which terms shall not include land assignments to members of the Tribe) or timber sale contracts covering any land or interests in land now or hereafter held by the Tribe within the boundaries of the Tongue River Reservation shall be made by the Tribe for a longer term than five years, as provided in section 1 (c), Article IV, of the Constitution of the Tribe, and all such leases, permits or contracts must be approved by the Secretary of the Interior or by his duly authorized representative; but oil and gas leases, water power leases, or any leases requiring substantial improvements of the land may be made for longer periods when authorized by law.

(4) No action shall be taken by or in behalf of the Tribe which in any way operates to destroy or injure the tribal grazing lands, timber, or other natural resources of the Tongue River Reservation. All leases, permits, and timber sale contracts relating to the use of tribal grazing or timber lands shall conform to regulations of the Secretary of the Interior authorized by section 6 of the Act of June 18, 1934, with

respect to range carrying capacity, sustained yield forestry management, and other matters therein specified. Conformity to such regulations shall be made a condition of any such lease, permit, or timber sale contract, whether or not such agreement requires the approval of the Secretary of the Interior, and violation of such condition shall render the agreement revocable, in the discretion of the Secretary of the Interior.

(e) To borrow money from the Indian Credit Fund in accordance with the terms of Section 10 of the Act of June 18, 1934 (48 Stat. 984), or from any other Governmental agency, or from any member or association of members of the Tribe, and to use such funds directly for productive tribal enterprises, or to loan money thus borrowed to individual members or associations of members of the Tribe, provided that the amount of indebtedness to which the Tribe may subject itself, other than indebtedness to the Indian Credit Fund, shall not exceed 25,000 dollars, except with the express approval of the Secretary of the Interior.

(d) To engage in any business that will further the economic well-being of the members of the Tribe or to undertake any activity of any nature whatever, not inconsistent with law or with any provisions of this charter.

(e) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this charter, with any person, association, or corporation, with any municipality or any county, or with the United States or the State of Montana including agreements with the State of Montana for the rendition of public services, provided that any contract involving payment of money by the corporation in excess of $5,000 in any one fiscal year shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(f) To pledge or assign chattels or future tribal income due or to become due to the Tribe, provided that such agreements of pledge or assignment, other than on agreement with the United States, shall not extend more than ten years from the date of execution and

shall not cover more than one-half the net tribal income from any one source, and provided further that any such agreement shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(g) To deposit corporate funds, from whatever source derived, in any national or state bank to the extent that such funds are insured by the Federal Deposit Insurance Corporation, or secured by a surety bond, or other security, approved by the Secretary of the Interior; or to deposit such funds in the Postal Savings Bank or with a bonded disbursing officer of the United States to the credit of the corporation.

(h) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

(i) To exercise such further incidental powers, not inconsistent with law, as may be necessary to the conduct of corporate business.

Termination of Supervisory Powers.

6. Upon the request of the Tribal Council for the termination of any supervisory power reserved to the Secretary of the Interior under sections 3 (b) (3), 3 (c), 3 (e), 3 (f), 3 (g), 3 (h), and section 8 of this charter, the Secretary of the Interior, if he shall approve such request, shall thereupon submit the question of such termination to the Tribe for a referendum vote. The termination shall be effective upon ratification by a majority vote at an election in which at least thirty per cent of the adult members of the Tribe residing on the reservation shall vote. If at any time after five years from the effective date of this charter, such request shall be made and the Secretary shall disapprove it or fail to approve or disapprove it within ninety days after its receipt, the question of the termination of any such power may then be submitted by the Secretary of the Interior or by the Tribal Council to popular referendum of the adult members of the Tribe actually living within the reservation and if the termination is approved by two-thirds of the eligible voters, shall be effective.

Corporate Property.

7. No property rights of the Northern Cheyenne Tribe, as heretofore constituted, shall be in any way impaired by anything contained in this charter, and the tribal ownership of unallotted lands, whether or not

assigned to the use of any particular individuals, is hereby expressly recognized. The individually owned property of members of the Tribe shall not be subject to any corporate debts or liabilities, without such owners' consent. Any existing lawful debts of the Tribe shall continue in force, except as such debts may be satisfied or cancelled pursuant to law.

Corporate Dividends. 8. The Tribe may issue to each of its members a nontransferable certificate of membership evidencing the equal share of each member in the assets of the Tribe and may distribute per capita, among the recognized members of the Tribe, all profits of corporate enterprises or income over and above sums necessary to defray corporate obligations and over and above all sums which may be devoted to the establishment of a reserve fund, the construction of public works, the costs of public enterprises, the expenses of tribal government, the needs of charity, or other corporate purpose. No such distribution of profits or income in any one year amounting to more than $25.00 per capita shall be made without the approval of the Secretary of the Interior. No distribution of the financial assets of the Tribe shall be made except as provided herein or as authorized by Congress.

Corporate Accounts. 9. The officers of the Tribe shall maintain accurate and complete public accounts of the financial affairs of the Tribe, which shall clearly show all credits, debts, pledges, and assignments, and shall furnish an annual balance sheet and report of the financial affairs of the Tribe to the Commissioner of Indian Affairs. The books of the Treasurer shall be open to inspection by members of the Tribe or duly authorized representatives of the Government at all reasonable times.

Amendments. 10. This charter shall not be revoked or surrendered except by act of Congress, but amendments may be proposed by resolutions of the Council which, if approved by the Secretary of the Interior, shall be effective when ratified by a majority vote of the adult members living on the reservation at a popular referendum in which at least 30 per cent of the eligible voters vote.

Ratification. 11. This charter shall be effective from and after the date of its ratification by a majority vote of the adult members of the Northern Cheyenne Tribe living on the Tongue River Reservation, provided at least 30 per cent of the eligible voters shall vote, such ratification to be formally certified by the Superintendent of the Tongue River Agency and the Chairman of the Tribal Council of the Tribe.

Submitted by the Secretary of the Interior for ratification by the Northern Cheyenne Tribe of the Tongue River Reservation in a popular referendum to be held on November 7, 1936.

T. A. WALTERS,
Acting Secretary of the Interior.
[SEAL]

WASHINGTON, D. C., *October 24, 1936.*

CERTIFICATE OF REFERENDUM ELECTION ON ACCEPTANCE OF CHARTER TONGUE RIVER RESERVATION

We, the undersigned, hereby certify that in accordance with instructions of the Acting Secretary of the Interior, as contained in his letter of October 24, 1936 to the Superintendent, and in the corporate charter of the Northern Cheyenne Tribe of the Tongue River Reservation, an election was held on November 7, 1936, for the purpose of voting upon the ratification of the said charter.

We, further certify that at this election 529 votes were cast by qualified electors and that as the total number of eligible voters is 744, the total of the votes cast is more than 30% of the eligible voters.

We further certify that we have completed an official count of these votes, the result of which shows the following:

Votes in favor of the adoption of charter	448
Votes opposed to adoption of charter	73
Votes rejected as illegal or spoiled	8
Total	529

In view of the above, we hereby certify that the aforesaid charter has been duly ratified and has become effective as provided in section 17 of the Act of June 18, 1934 (48 Stat. 984).

CHAS. H. JENNINGS,
Superintendent.
JOE WHITEBEAR,
President of the Tribal Council.
EUGENE FISHER, SR.,
Chairman of Election Committee.
RUFUS WALLOWING,
Member of Election Board.

LAME DEER, MONTANA, *November 9, 1936.*

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This manuscript was followed exactly as submitted.

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